IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-616

MOHASCO CORPORATION,
Petitioner,

v.

RALPH H. SILVER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
JEFFREY C. MCGUINESS
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005

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INDEX

INDEX—Continued

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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The Equal Employment Advisory Council ("EEAC"), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioner.[1]

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary non-profit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e, *et seq.* ("the Act"), as well as other equal employment statutes and regulations. As such, they have a direct interest in the principal issues presented by the instant case—i.e., whether an EEOC charge filed between the 180th and 300th day following the occurrence of an alleged unlawful employment practice is timely under 42 U.S.C. § 2000e-5(e) where no proceedings were initially instituted before a "706 agency" within 180 days of the unlawful act, and whether a charge received by EEOC during the 60-day deferral period mandated by 42 U.S.C. § 2000e-5(c) may be considered as "filed" with the Commission despite the subsection's provision that no charge may be filed with EEOC "before the expiration of sixty days after proceedings

have commenced under a State or local law. . . ." See 42 U.S.C. § 2000e-5(c).[2]

STATEMENT OF THE CASE

Respondent Ralph H. Silver was terminated by the Petitioner, Mohasco Corporation, from his position as senior marketing economist on August 29, 1975. On June 15, 1976, 291 days after his termination, Silver submitted a letter to the Equal Employment Opportunity Commission alleging that during his thirteen-month tenure with the Corporation, he had been the target of harassment by Mohasco executives because of his Jewish beliefs. Under Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e),[3] an aggrieved individual must file a

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[2] Because of its interest in issues pertaining to equal employment, EEAC has filed briefs as amicus curiae in a number of other recent cases in this Court raising important equal opportunity issues. *See, e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Great American Federal Savings & Loan Association* v. *Novotny*, 99 Sup. Ct. 2345 (1979); *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978); and *Kaiser Aluminum & Chemical Corp.* v. *Weber*, 99 S. Ct. 2721 (1979).

[3] 42 U.S.C. § 2000e-5(e) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful

charge with the Commission within 180 days after the alleged unlawful employment practice occurred, unless proceedings have been initially instituted before a 706 agency within 180 days,[4] in which case the complainant has until the 300th day from the alleged unlawful act in which to file.

Using a Notice of Deferral Transmittal dated June 15, 1976, the Commission forwarded Silver's letter to the New York State Division of Human Rights ("NYSDHR"). Under Section 706(c) of Title VII 42 U.S.C. § 2000e-5(c), "no charge may be filed with [the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law. . . ."[5] Ac-

employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

[4] Under 42 U.S.C. § 2000e-5(c), a "706 agency" is a state or local agency authorized to grant or seek relief from employment discrimination.

[5] 42 U.S.C. § 2000e-5(c) provides:

In the case of an alleged unlawful employment practice occuring in a State, or a political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, *no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated,* provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority. (Emphasis supplied.)

cordingly, EEOC's Notice of Deferral contained the statement that "[t]he Commission will automatically file this charge at the *end* of the deferral period. . . ." (Emphasis supplied.) *Silver* v. *Mohasco*, 19 FEP Cases 677, 681 (N.D.N.Y. 1978). By letter to Silver dated June 18, 1976, NYSDHR advised him of receipt of his letter to the EEOC and requested that he file a complaint with the Division within 30 days. Fifty-five days later, on August 12, 1976, Silver filed a verified complaint with NYSDHR setting forth allegations similar to those made in his original letter to the EEOC.

The 60-day deferral period having ended on August 14, 1976, EEOC notified Mohasco on August 20, 1976, that Silver had filed a charge against it alleging employment discrimination prohibited by Title VII. On February 9, 1977, the Human Rights Division issued its determination, subsequently upheld by the

New York State Human Rights Appeal Board on December 22, 1977, that there was no probable cause to believe that Mohasco had engaged in the unlawful discriminatory practice complained of by Silver. On August 24, 1977, the EEOC issued a similar determination that there was no reasonable cause to believe Silver had been subjected to unlawful employment discrimination and also issued to him a notice of right to sue.

Thereafter, on November 23, 1977, Silver brought this suit in the district court alleging that Mohasco had committed acts of employment discrimination against the Respondent in violation of Title VII. The Corporation having moved for summary judgment, the district court, on October 17, 1978, dismissed the complaint in its entirety for lack of subject matter jurisdiction holding that Silver had failed to make a timely filing of his charge with the EEOC as required by § 706. On July 13, 1978, a divided Court of Appeals for the Second Circuit reversed the District Court, holding that under § 706(e), Silver's charge had been timely filed with the EEOC. It also concluded that for purposes of determining whether a complainant has made a timely filing of a charge, a charge submitted to the EEOC during the 60-day deferral period is to be considered "filed" with the Commission upon its initial receipt, notwithstanding § 706(c)'s prohibition against any such charge being filed with the EEOC during that period.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act specifies with precision the procedures that complainants must follow in filing claims for relief from alleged unlawful

employment practices. Under Section 706(e), the Act's remedial scheme requires as a condition of use of Title VII remedies, that an employment discrimination charge be submitted to either the EEOC or a state 706 agency within 180 days of the occurrence of the unlawful act. If a complainant initially institutes proceedings with a 706 agency within the required 180-day period, then the subsection provides the aggrieved individual an additional 120 days in which to file a charge with the EEOC. The purpose of the 300-day extended filing period is to protect a complaint's right to pursue Title VII remedies where initial resort is made to state enforcement mechanisms.

The extended filing period, however, is not available to a complainant failing to make an initial filing with some agency, either federal or state, within 180 days. Most importantly, a claim barred by the 180-day filing limitation cannot be bootstrapped into federal jurisdiction by the filing of a charge with a 706 agency between the 180th day and the 300th day. The Second Circuit's conclusion that application of the 300-day extended filing period merely depends on whether the cause of action arose in a deferral state, not on whether a complainant initially filed with some agency within 180 days, is supported by neither the language of the subsection itself nor its legislative history. Moreover, as the thrust of Section 706 is to encourage the early resolution of discrimination complaints through the prompt filing of claims, Congress did not intend that complainants in states having a 706 agency were to be allowed to proceed less diligently than those in states without such an agency. Rather, it was the intention of Congress in fashion-

ing Section 706(e) to require all complainants, no matter where they reside, to make an initial filing with either the EEOC or a state 706 agency within 180 days of the occurrence of the discriminatory act.

Section 706(c), as does Section 706(e), provides another precise rule governing the filing of employment discrimination claims. Intended to insure prior resort to 706 agencies, the subsection prohibits a charge from being filed with the EEOC before the expiration of sixty days after proceedings have been commenced before a 706 agency, unless such proceedings have been earlier terminated. Because the subsection prohibits a charge from being filed with the EEOC during the period in which a 706 agency has exclusive jurisdiction over the claim, charges submitted to the Commission during that period are held in suspended animation until the conclusion of the deferral period, at which time they are automatically filed. As no charge may be filed for purposes of Section 706(e) until the conclusion of the deferral period, the Second Circuit incorrectly concluded that a charge submitted to the EEOC during that period is to be considered as "filed" upon initial receipt. Its decision to ignore the precise words of the statute was improper in light of the refusal of Congress during consideration of the 1972 Civil Rights Act amendments to accept an amendment permitting such charges to be filed during the deferral period.

Accordingly, the district court properly granted Mohasco's motion for summary judgment on the ground that the court lacked subject matter jurisdiction as Silver had failed to make a timely filing with either the EEOC or the NYSDHR within 180 days of his discharge. Secondly, even if this Court

were to hold that the locus of the cause of action is the sole determinant in the decision as to whether the 300-day extended filing period applies to a timeliness question, Silver nevertheless failed to make a timely filing with the EEOC. Section 706(c) prevented the charge that he had submitted to the EEOC on the 292nd day following his discharge from being filed for purposes of Section 706(e) until the 352nd day after the alleged discriminatory act, long after the 300th day statutory filing limit.

ARGUMENT

I. An Unlawful Employment Practice Charge Not Filed With Either the EEOC or a 706 Agency Within 180 Days of the Alleged Act Must Be Dismissed as Untimely Under Section 706.

A. *A Charge Filed With the EEOC Less Than 300 Days But More Than 180 Days After the Alleged Unlawful Employment Practice Occurred Is Not Timely Where the Complainant Failed to Institute Proceedings Initially With a 706 Agency Within 180 Days.*

As Title VII of the Civil Rights Act of 1964 "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit . . .," *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974), Section 706(e) of the Act provides a simple rule for the resolution of timeliness questions arising under the statute. If a person claiming employment discrimination intends to rely on the remedial scheme established by the Act, then "a charge must be filed with the EEOC within 180 days of the alleged violation of Title VII. . . ." *Occidental Life Insurance Co. of Calif.* v. *EEOC*, 432 U.S. 355, 371-372 (1977); 42 U.S.C. § 2000e-5(e);

accord, Chapman v. *Pacific Telephone & Telegraph Co.*, 456 F. Supp. 65, 71-72 (N.D. Cal. 1978); *Ashley* v. *Goshen Community Schools Corp.*, 461 F. Supp. 22 (N.D. Ind. 1978), *aff'd*, 588 F.2d 839 (7th Cir. 1978). *See Keyse* v. *California Texas Oil Corp.*, 442 F. Supp. 1257, 1258 (S.D.N.Y.), *aff'd*, 590 F.2d 45 (2nd Cir. 1978); *Johnson* v. *Host Enterprise*, 19 FEP Cases 1315 (E.D. Pa. 1979).

The sole exception to the 180-day rule for filing with EEOC concerns those instances in which a complainant, before seeking redress through Title VII remedies, institutes proceedings before a state or local agency authorized to provide relief from such discrimination. Where an individual has "initially instituted" proceedings before such an authority within 180 days of the occurrence of the alleged unlawful employment practice, the complainant's charge need not be filed with the EEOC until the 300th day following the occurrence of the act. 42 U.S.C. § 2000e-5(e). If, however, the complainant fails to file a charge with *either* the EEOC or a 706 agency within 180 days of the discriminatory act, but waits until some time between the 180th and 300th day before instituting proceedings, the charge for purposes of Title VII remedies is untimely regardless of whether the state has a 706 agency. *Id.; Olson* v. *Rembrandt Printing Company*, 511 F.2d 1228 (8th Cir. 1975) (*en banc*); *Rodriguez* v. *Southern Pacific Transportation Company*, 587 F.2d 980 (9th Cir. 1978); *Geromette* v. *General Motors Corporation*, 21 FEP Cases 649, 21 EPD ¶ 30,424 (6th Cir. 1979); *Wiltshire* v. *Standard Oil of California*, 447 F. Supp. 756 (N.D. Cal. 1978); *Bittner* v. *Combustion Engineering*, 19 FEP Cases 1295 (N.D. Cal. 1979); *Mills* v. *National Distillers*

Products Co., 435 F. Supp. 72, 74-75 (S.D. Ohio 1977). *See, Occidental Life Insurance Co. of Calif.* v. *EEOC, supra*, 432 U.S. 359, n. 8; *Domingo* v. *New England Fish Co.*, 445 F. Supp. 421, 427 (W.D. Wash. 1977). In other words, a claim barred by the 180 day filing limitation found in Section 706(e) cannot be bootstrapped into federal jurisdiction by the filing of a charge with a 706 agency before the 300th day. *Id.*; *Mobley* v. *Acme Markets, Inc.*, 20 FEP Cases 620 (D. Md. 1979). Rather, Section 706(e) requires a complainant to institute proceedings with *some* agency, either state or federal, by the 180th day. The court of appeals for the Eighth Circuit sitting *en banc* in *Olson* v. *Rembrandt Printing Company*, 511 F.2d 1228, 1233, correctly explained Section 706(e) as requiring that:

> [A] charge of employment discrimination must be filed within 180 days whether or not the complainant is in a deferral state. If in a deferral state it must be filed with the state or local agency within 180 days. The complainant is then given the extended period for filing with the EEOC to allow him to pursue his state claim without waiving possible relief under the Federal Act.[6]

Applying the rule of Section 706(e) to the instant case, it is clear that Silver failed to make a timely filing with the EEOC. His charge, filed with the Commission less than 300 days but more than 180 days

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[6] A prior Eighth Circuit panel decision written by Judge Stephenson, *Richard* v. *McDonnell Douglas Corporation*, 469 F.2d 1249 (8th Cir. 1972), reached a different conclusion. However, the Eighth Circuit sitting *en banc* in *Olson* refuted its decision in *Richard. Olson, supra*, 511 F.2d at 1233.

after the alleged unlawful employment practice occurred, was not timely, as the complainant failed to institute proceedings initially with the NYSDHR within the 180 day period required by 42 U.S.C. § 2000e-5(e).[7]

Silver, however, argues that the applicability of the 300-day exception depends on the locus of the alleged discriminatory act, not on whether the complainant initially instituted proceedings with a 706 agency during the prescribed 180-day period. He asserts that if the locus is in a state with a 706 agency, then a complainant has 300 days (or until 30 days after the termination of state proceedings, whichever is earlier) in which to file a charge of employment discrimination with the EEOC. Conversely, if the locus of the unlawful act is in a state *not* having a 706 agency, then the complainant would be denied the 300-day filing exception. Accordingly, those charging parties in nondeferral states would have 180 days in

[7] Other courts have adopted contrary interpretations of § 706(e) without fully setting forth their reasons for doing so. *See Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Ugiansky* v. *Flynn and Emrich Company*, 337 F. Supp. 807 (D. Md. 1972); *Ashworth* v. *Eastern Airlines, Inc.*, 389 F. Supp. 597 (E.D. Va. 1975); *Ortega* v. *Construction & General Laborers' Union No. 390*, 396 F. Supp. 976 (D. Conn. 1975). *Lo Re* v. *Chase Manhattan Corp.*, 431 F. Supp. 189 (S.D.N.Y. 1977), relied on a more thorough discussion found in *Doski* v. *M. Goldseker Co.*, 539 F.2d 1326 (4th Cir. 1976). For the reasons cited above, the language of the statute itself, its legislative history, as well as important policy considerations, require the conclusion that a complainant must file an employment discrimination charge with either a state or local agency or the EEOC within 180 days of the unlawful act.

which to "initially institute" proceedings, whereas those in deferral states would have 300 days in which to do so. Such a strained interpretation of Section 706(e) is not supported by either the words of the subsection itself or its legislative history.

B. *The Legislative History Demonstrates That Congress Intended That a Charge Be Filed With the EEOC or a 706 Agency Within 180 Days of the Occurrence of the Unlawful Act as a Precondition to Use of Title VII's Enforcement Scheme.*

Analysis of the legislative history of Section 706 provides conclusive evidence that the "extended filing period was not intended as a bonus for complainants residing in a deferral state, but as a means of effecting an accommodation between the federal right and the requirement of pre-amendment § 2000e-5(b) of initial resort to an available state or local agency." *Olson* v. *Rembrandt Printing Company*, 511 F.2d 1228, 1233; *accord, Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 825, n. 35 (7th Cir. 1972) (Stevens, J.).[8] As states were to have a "prior opportunity to consider discrimination complaints . . .," *Love* v. *Pullman Company*, 404 U.S. 522, 526 (1972), Section 706(e) was fashioned "to give the state agency an initial opportunity to process the claim without jeopardizing the federal right. . . ." *Olson* v. *Rembrandt Printing Company, supra*, 511 F.2d 1128, 1232.

[8] This Court stated in *Oscar Mayer & Co.* v. *Evans*, 99 Sup. Ct. 2066, 2071 (1979) with respect to Section 706, "[b]ecause state agencies cannot even attempt to resolve discrimination complaints not brought to their attention, the section has been interpreted to require individuals in deferral states to resort to appropriate state proceedings before suit under Title VII." (Footnote omitted.)

Passage of the 1964 Civil Rights Act was made possible by the Dirksen-Mansfield compromise over such provisions as those governing time limits for filing claims.[9] This compromise, subsequently approved by both chambers,[10] contained an enforcement procedure imposing "an extremely short limitations period and [requiring] . . . resort to state procedures, where available, as a condition precedent to a private action. . . ." *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 821 (7th Cir. 1972). According to the explanation of the compromise given by Senator Dirksen, 110 Cong. Rec. 12819 (1964):

> New subsection (d) [now (e)] requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in subsection (b) [now (c)], he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier.

[9] According to the U.S. Equal Employment Opportunity Commission, 1 Legislative History of Titles VII and XI of Civil Rights Act of 1964 3001 (hereinafter, "1964 Legislative History"):

> The Title VII provisions that were adopted by the House and that were the subject of extensive discussion in the report of the House Judiciary Committee were modified substantially in the substitute measure adopted in the Senate. The substitute bill did not go through the usual committee procedure. Instead, it was hammered out in informal bipartisan conferences, with Majority Leader Mansfield (D., Mont.), Minority Leader Dirksen (R., Ill.), and Senators Humphrey (D., Minn.) and Kuchel (R., Calif.) as the principals. As a result, there was no committee report on the Senate bill. Moreover, since the House then voted to accept the Senate bill without change, there was no Senate-House conference report.

[10] *See* 1964 Legislative History at 10, 11.

Senator Dirksen concluded by emphasizing that "[t]he additional 120 days is to allow him to *pursue* his remedy by State or local proceedings." (Emphasis supplied.)[11] *Id.* It was not intended to grant persons in deferral states who failed to meet the 180 day deadline an additional 120 days in which to *initiate* proceedings to remedy employment discrimination. Then-Judge Stevens' reading of the legislative history of the 1964 Act in *Moore* v. *Sunbeam Corp.*, *supra*, 459 F.2d at 825, n.35, led him to conclude that the "legislative history as a whole indicates a basic purpose to require a complainant to make his initial filing within 90 [now 180] days; the extension of the period to 210 [now 300] days in certain states was plainly intended to permit him to 'exhaust' the state procedures."

Further clarification of Congressional intent may be found in the legislative materials accompanying the 1972 amendments to the Civil Rights Act of 1964. Under those amendments, the language of the subsection governing the filing of charges was left

[11] Senator Humphrey added to the explanation of the compromise reached on § 706(d), now § 706(e), that the provision "is carefully worded to protect an individual who, in good faith, unnecessarily seeks to comply with the requirement of initial resort to State or local authority. Such a person will not lose his right to seek Federal relief simply because the 90-day period for filing with the Federal Commission has elapsed while he seeks to pursue State remedies." *Id.* at 3006.

substantially unchanged, except that the period for filing claims was expanded from 90 to 180 days, except where a complainant initially sought state or local remedies for unlawful discrimination, in which case, the individual was given 300 days in which to file a charge with the EEOC. A section-by-section analysis of the procedures approved by Congress relative to the filing of claims prepared by Rep. Dent, then the chairman of the General Subcommittee on Labor of the House Committee on Education & Labor,[12] contains the following explanation relative to § 706(e):

> Procedure Where No State Equal Employment Opportunity Law Exists
>
> (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.
>
> * * * *
>
> Procedure Where State Equal Employment Opportunity Law Exists
>
> (1) A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice. 118 Cong. Rec. H 1863 (1972).

The explanation went on to discuss the exception to the 180 day filing rule that "if a charge is *initially filed* with a state or local agency, such charge must be filed with the Commission within 300 days after the alleged unlawful practice has occurred or within 30 days after receipt of notice that the state or local

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[12] The General Subcommittee on Labor was the legislation's jurisdictional subcommittee in the House of Representatives. *See,* C. Brownson, 1972 *Congressional Staff Directory* 314 (1972).

agency has terminated its proceedings."[13] (Emphasis supplied.)

Thus, it was the intention of those fashioning the statutory language to require as a condition of use of Title VII remedies "that a charge should be initially filed with *some* agency within 90 [now 180] days." *Wiltshire* v. *Standard Oil Co. of California, supra,* 447 F. Supp. at 759 (emphasis in original). Although the interpretation advanced by Silver may facilitate the filing of claims, it "would nullify the legislative compromise that made passage of the law possible in the first place." *Id.* at 760.

C. *The Fundamental Purpose of Section 706(e) Is to Encourage the Early Resolution of Employment Discrimination Claims no Matter Where They Arise, not to Permit Those in Deferral States to Proceed With Less Diligence Than Those in Other States.*

The extended filing period provided by Section 706(e) for those instances in which a complainant first institutes proceedings before a 706 agency protects the individual's right to pursue federal remedies if the state action provides insufficient redress. There is no reference in the legislative history indicating that Congress intended that "complainants in some states were to be allowed to proceed with less diligence than those in other states." *Moore, supra,*

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[13] According to *Wiltshire* v. *Standard Oil of California, supra,* 447 F. Supp. at 763, the Dent statement and the analysis of § 706 found at 118 Cong. Rec. 7565 (1972) mean "that the complainant must make his initial filing within the time provided, now 180 days; where the initial filing is with a 706 agency, the complainant has an additional 120 days to file with the EEOC."

459 F.2d at 825, n. 35. Rather, Section 706(e) encourages the settlement of employment claims at the state and local level by ensuring that those who initially sought relief through 706 agencies would not be foreclosed from federal remedies. Moreover, the prompt filing of employment discrimination claims with an agency whose enforcement scheme contemplates cooperation and voluntary compliance with antidiscrimination requirements encourages the settlement of disputes before attitudes have hardened and permanent changes have been made in the defendant's personnel structure. Congress established the EEOC not to "function simply as a vehicle for conducting litigation on behalf of private parties . . .," but as "a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." *Occidental Life Insurance Co. of Calif.* v. *EEOC*, *supra*, 432 U.S. at 368.[14] "[I]t cannot be gainsaid that conciliation and voluntary settlement are the preferred means for resolving employment discrimination suits." *United States* v. *Allegheny-Ludlam Industries, Inc.*, 517 F.2d 826, 846 (5th Cir.) *cert. denied*, 425 U.S. 944 (1975). One of the methods chosen by Congress to promote the

[14] *See, Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 472 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (purpose of filing requirement to enable EEOC to conciliate); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) (purpose of bringing charge before EEOC to provide means for voluntary compliance and conciliation, expeditiously and inexpensively); *Smith* v. *Joseph Horne Co., Inc.*, 438 F. Supp. 1207 (W.D. Va. 1977) (prime objective of Title VII is to accomplish compliance with law through conciliation).

nonlitigious settlement of disputes was the provision of a deferral mechanism "to give state agencies a prior opportunity to consider discrimination complaints. . . ." *Love* v. *Pullman Company*, *supra*, 404 U.S. at 526. The method was not chosen in order that complainants in states having such agencies could proceed less expeditiously than those in states without such agencies. Clearly, the purpose of Title VII is to encourage, not delay, the resolution of employment discrimination claims.

If the parties are unable to settle their dispute voluntarily, however, prompt notice of the possibility of an enforcement action gives the defendant "an opportunity to gather and preserve evidence in anticipation of a court action." *Occidental Life Insurance Co. of Calif.* v. *EEOC*, *supra*, 432 U.S. at 372. Time limitation periods, therefore, "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-349 (1944). Congress saw six months as a sufficient period of time in which to initiate proceedings to remedy employment discrimination. Thus, in order to carry out the fundamental purposes of the Act through the prompt resolution of disputes, lower courts should not be permitted to broaden the limitations period mandated by Section 706(e) and thereby encourage delay in the filing of charges.

Moreover, Title VII permits a court to grant such forms of relief as job reinstatement, constructive or remedial seniority or "any other equitable relief as

the court deems appropriate." 42 U.S.C. § 2000e-5(g). Because the employment rights of persons other than those of a particular complainant, including the rights of persons who may be members of a group protected by Title VII, could well be affected by a remedial order, it is most important that the resolution of employment discrimination suits be accomplished before employment relationships have substantially altered. As stated in *Wiltshire* v. *Standard Oil of California, supra,* 447 F. Supp. at 759:

> Requiring all claimants to file within 180 days preserves the integrity of the short limitation period by imposing an equal duty of diligence on all claimants in asserting their federal claim, regardless of where they happen to live. There is no evidence in the legislative record that Congress intended to benefit claimants in a deferral state by giving them additional time in which to act on their claim simply because it arose in a state with a 706 agency. To permit claimants who happen to reside in such a state to file within 300 days while limiting claimants in non-deferral states to 180 days results in obvious and unwarranted inequity not likely to have been intended by Congress. Requiring everyone to file within 180 days removes that inequity and is entirely consistent with the statutory language.

It is undisputed that Silver failed to file a charge of employment discrimination against Mohasco with either the EEOC or the NYSDHR within 180 days of his discharge. For the reasons given above, the district court correctly determined that Silver had failed to make a timely filing as required by 42 U.S.C. § 2000e-5(e). Because failure to file a charge in a

timely manner requires that a charge be dismissed, *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968),[15] the district court correctly granted Mohasco's motion for summary judgment on the ground that Silver's failure to make a timely filing deprived the court of subject matter jurisdiction.

II. Where Proceedings Are Initially Instituted Before a 706 Agency, a Charge Received by the EEOC Is Not "Filed" for Purposes of 42 U.S.C. § 2000e-5(e) Until the Conclusion of the 60-Day Deferral Period, Unless the 706 Proceedings Are Earlier Terminated.

A. *A Charge Deferred to a 706 Agency for Initial Processing Cannot Be Treated as "Filed" With the EEOC Until the Conclusion of the 60-Day Deferral Period.*

As does its subsection (e), Section 706(c) of Title VII provides another simple procedural rule governing the filing of employment discrimination charges with the Equal Employment Opportunity Commission. Intended to insure prior resort to 706 agencies, the subsection requires that "no charge may be filed [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have

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[15] *Accord, Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064 (2d Cir. 1977); *Williams* v. *Norfolk & W. Railway Company*, 530 F.2d 539 (4th Cir. 1975); *Martin* v. *Georgia-Pacific Corp.*, 568 F.2d 58 (8th Cir. 1977). The timely filing of a charge is a jurisdictional precondition to commencement of court action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). As this court stated in *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558 (1977): "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."

been commenced under the State or local law, unless such proceedings have been earlier terminated. . . ." 42 U.S.C. § 2000e-5(c). Because no charge may be filed with the Commission during the period in which the 706 agency has exclusive jurisdiction over the claim, if the EEOC receives a charge during that period, the Commission may "properly hold a complaint in 'suspended animation,' automatically filing it upon termination of the state proceedings." *Love* v. *Pullman Company*, 404 U.S. 525, 526 (1972); *accord, Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 823 (7th Cir. 1972) (Stevens, J.); *Gill* v. *Monroe County Dept. of Social Services*, 79 F.R.D. 316 (W.D.N.Y. 1978).[16] There can be no "filing" of a charge received by the EEOC during the initial 60-day period as Section 706(c) strips the EEOC of jurisdiction over the claim until the conclusion of the deferral period. *Nishiyama* v. *North American Rockwell Corp.*, 49 F.R.D. 288, 290-291 (C.D. Cal. 1970).

Although Title VII is a remedial statute often invoked by laypersons, the Second Circuit faulted the district court for insisting on a literal reading of the Act's procedural requirements. *Silver* v. *Mohasco*, 602 F.2d 1083, 1087 (2nd Cir. 1979). Rejecting his determination that the express language of Section 706(c) barred the filing of Silver's employment discrimination charge until the end of the deferral period, and that "a charge is 'filed' for purposes of

[16] *Gill, supra*, 79 F.R.D. at 332, held that "[u]nder EEOC's regulations, a copy of a complaint filed prematurely with the EEOC is properly referred to the state agency, and the complaint itself is deemed to be filed *after* the sixty-day waiting period expires or the agency proceedings terminate whichever occurs first." (Emphasis supplied.)

§ 706(e) when the state deferral period ends . . .," the appellate court relied on "its informed reading of Title VII, consistent with its purposes . . ." to conclude that Congress in drafting Section 706(c) for some reason used a phrase which, when read literally, conveyed the opposite of the intended meaning. *Id.*[17] We would submit, however, that "[t]here can be no more reliable an indication of legislative intent than the specific statutory words selected by

[17] The Second Circuit cited as support for its conclusion *Richard* v. *McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972); *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); and *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F.2d 723 (6th Cir. 1972). For the reasons discussed herein, however, the Court of Appeals in the instant case should have affirmed the District Court's decision to adhere strictly to the language of §§ 706(c) and (e). Moreover, the approach taken in *Richard* was subsequently rejected by the Eighth Circuit sitting *en banc* in *Olson* v. *Rembrant Printing Company*, 511 F.2d 1228, 1233 (8th Cir. 1975). Also, *Anderson, Richard* and *Vigil* assume that the submission of a charge to the EEOC before deferral automatically "tolls" the § 706(e) limitations period. Whatever support there may have been for a tolling rationale, however, was severely undermined by *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976). *See also Albano* v. *General Adjustment Bureau, Inc.*, 21 EPD ¶ 30,442 (S.D.N.Y. 1979). Moreover, the Sixth Circuit's recent decision in *Geromette* v. *General Motors Corp.*, 21 FEP Cases 649 (6th Cir. 1979) indicates that court's unwillingness to rely on the approach discussed in its prior *Anderson* opinion. Further, it has been held that equitable tolling is only appropriate relative to Section 706(e) if the complainant has been subjected to some form of affirmative misconduct which prevents a timely filing of a charge. *Chappell* v. *Emco Machine Works Company*, 601 F.2d 1295 (5th Cir. 1979). The facts of the instant case do not show any such misconduct.

Congress. . . ." *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696, 707 (5th Cir. 1973), *rehr'g denied*, 478 F.2d 1403, *cert. denied*, 415 U.S. 914 (1974). The proper statement of the filing rules contained in Sections 706(c) and (e) is that no charge may be "filed" for purposes of Section 706(e) until the conclusion of the state deferral period.

As discussed, Section 706(e) requires all claims of unlawful employment discrimination to be filed with an authority empowered to remedy such discrimination within 180 days of the occurrence of the unlawful employment practice.[18] When an aggrieved person initially institutes proceedings with a state or local authority within 180 days, the Act provides the complainant with an additional 120 days within which to file with the EEOC. During the first 60 days of the state processing of an employment discrimination claim, the EEOC is foreclosed from taking any action with respect to the claim unless the proceedings are earlier terminated. 42 U.S.C. § 2000e-5(c).

Section 706(e) was not fashioned to bar those pursuing state remedies from submitting a charge to EEOC during the 60-day deferral period, nor was the subsection intended to require claimants to refile the same charge or file a new charge with the Commission at the conclusion of the deferral period. *Love* v. *Pullman Company*, *supra*, 404 U.S. at 527. But as *Love* also demonstrates, Section 706(e) nonetheless prohibits a charge submitted within the 60-day period from being considered as "filed" until the end of that period. In *Love*, the plaintiff had submitted a letter to the EEOC alleging employment discrimination.

[18] *See*, pp. 9-21, *supra*.

While treating the letter as a complaint, the Commission refused to file a charge upon receipt in accordance with Section 706(c) [then Section 706(b)], but deferred the matter to the appropriate state 706 agency for processing. Upon the termination of the state proceedings, the case was referred back to the EEOC, which began investigating the allegations without receiving a new complaint from the plaintiff. When the employer sought to bar the plaintiff's suit in district court, this Court held that the plaintiff was not required by Section 706 to file a new complaint with the EEOC, as his original letter to the Commission was held in "suspended animation" until the conclusion of the deferral period, at which time it was automatically filed. As this Court stated in *Love*, 404 U.S. at 527:

> To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality.

Further support for the conclusion that Section 706(c) requires that no charge may be considered as filed with the EEOC before the end of the 60-day deferral period may be found in footnote 5 of this Court's opinion in *Love*. There, the Court quoted an EEOC regulation which provided that a charge is deemed filed when the Commission receives a statement from the aggrieved individual alleging unlawful employment discrimination. *Love*, *supra*, 404 U.S. at 526, *citing* 29 C.F.R. § 1601.11(b) (1971). Its reading of the statutory language, however, led the Court to conclude that:

> the statutory prohibition of § 706(b) [now (c)] against filing charges that have not been re-

ferred to a state or local authority *necessarily creates an exception to the regulation requiring filing on receipt. Id.* (Emphasis supplied.)

The suspended animation requirement of Sections 706(c) and (e) was followed by the district court in the instant case and was cogently argued by Judge Meskill in his dissenting opinion to the decision of the Court of Appeals. According to the district court, "it would appear to be clear that the plaintiff's charge could not have been immediately filed but must have been in 'suspended animation' status until 60 days after the proceeding was commenced before the Division of Human Rights . . . at which time plaintiff's charge would have been automatically filed by the EEOC." *Silver* v. *Mohasco Corp., supra,* 19 FEP Cases at 682. Then-Judge Stevens reached a similar conclusion in *Moore* v. *Sunbeam Corp., supra,* 459 F.2d at 826, in which he rejected the employer's argument that a charge received by EEOC and referred to a state agency must again be presented to the EEOC at the conclusion of the deferral period or upon the termination of the state proceedings. He reasoned, in reliance on the *Love* decision, that a charge received by EEOC is "automatically filed upon termination of the state proceedings or 60 days after initiation of the state proceedings, whichever is earlier." *Id.* at 823.[19] Similarly, in a decision preceding

[19] The court in *Anderson* v. *Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972) also concluded that a charge is "not 'filed' within the meaning of the Act until expiration of the referral period, at which time it [becomes] automatically filed." Nevertheless, *Anderson* incorrectly concluded that a timely filing had been made relying on the

the *Love* case, *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 892 (2d Cir. 1971), *cert. denied*, 452 U.S. 918 (1972), a discussion was made of EEOC filing procedures relative to claims of employment discrimination deferred to State or local authorities:

> A copy of a complaint filed prematurely with the Commission is promptly transmitted to the appropriate local or state agency, while the complaint itself is held by the EEOC until termination of the local or state proceedings or the lapse of the 60-day statutory waiting period, whichever occurs first, and *then it is considered filed.* (Footnote omitted.) (Emphasis supplied.)

Silver, therefore, failed to make a timely filing of his charge for purposes of Section 706(e) for two reasons. As previously discussed, the filing requirements of Section 706(e) were not met because proceedings were initially instituted with neither the EEOC nor the NYSDHR within 180 days of his discharge. Moreover, even if this Court were to hold that persons residing in deferral states have 300 days in which to file regardless of whether proceedings were initially instituted within 180 days, Silver's charge did not meet the filing requirements of Section 706(e) for purposes of Title VII remedies. His initial filing was made on the 291st day following the alleged discriminatory act when his letter was referred to the appropriate 706 agency. Because Section 706(c) prohibits a filing with the EEOC until the conclusion of the deferral period, Silver's charge

tolling rationale discussed at footnote 18, *supra*. The continuing validity of *Anderson's* tolling rationale in the Sixth Circuit, however, is questionable in light of *Geromette* v. *General Motors Corp.*, 21 FEP Cases 649 (6th Cir. 1979).

in the form of his letter was held in suspended animation by the EEOC until 60 days had elapsed. The day after the deferral period expired—352 days after the Respondent's termination—the charge was filed, well beyond the limitations period mandated by Section 706(e). Accordingly, the district court properly held that Silver failed to make a timely filing of his charge.[20]

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[20] Silver also relies on an EEOC regulation, 29 CFR § 1601.12(b)(1)(v)(A) (1977), that provides:

> In cases where the document is submitted to the Commission more than 180 days from the date of the alleged violation but within the period of limitation of the particular 706 Agency, the case shall be deferred pursuant to the procedures set forth above: *Provided, however,* that unless the Commission is earlier notified of the termination of the State or local proceedings, the Commission will consider the charge to be filed with the Commission on the 300th day following the alleged discrimination and will commence processing the case. . . ."

This regulation was found by the district court "to be contrary to the plain language of 42 U.S.C. § 2000e-5(c) . . ." as it would permit a complainant to circumvent the bar against filing charges with the EEOC during the 60-day referral period. 19 FEP Cases at 685. Where a federal agency promulgates regulations that fail to honor the clear meaning of a statute as revealed by its language, purpose and history, such regulations have no force or effect. *See Southeastern Community College* v. *Davis,* 99 Sup. Ct. 2361, 2369 (1979); *General Electric Company* v. *Gilbert,* 429 U.S. 125, 140-143 (1976).

B. *In Drafting Section 706, Congress Specifically Concluded That EEOC Could Not Assume Jurisdiction Over a Charge Before a 706 Agency Had the Opportunity to Resolve the Dispute.*

As stated in *Love,* holding a charge in suspended animation until the conclusion of the deferral period at which time it becomes automatically filed "complies with the purpose of both § 706(b) [now (c)], to give state agencies a prior opportunity to consider discrimination complaints, and of § 706(d) [now (e)], to ensure expedition in the filing and handling of those complaints." *Love, supra,* 404 U.S. at 526. Careful examination of the legislative history of Section 706 demonstrates that Congress clearly intended to vest exclusive jurisdiction of Title VII claims with state and local 706 agencies for an initial 60-day period. Only when that period ended did Congress intend that a complainant could initiate Title VII proceedings by filing a charge.

H.R. 7152 as reported by the House Committee on the Judiciary and subsequently approved by the House in 1963 contained no language relative to the deferral of employment discrimination claims to state and local authorities. *See,* H.R. REP. No. 914, 88th Cong., 1st Sess. (1963). When the measure bogged down in protracted Senate debate, deferral procedures were incorporated into the Dirksen-Mansfield compromise as a condition of Senate approval of the measure.[21] According to Senator Dirksen, "in cases where a state or local authority is authorized to remedy complaints of employment discrimination,

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[21] *See,* footnote 9, *supra,* p. 14.

§ 706(b), [now § 706(c)] requires that no charge may be filed with the Commission by the person aggrieved until 60 days . . . have been commenced under the State or local law." 1964 Legislative History at 3018.[22] The purpose of this subsection, he stated, was to keep "primary, exclusive jurisdiction in the hands of the State commissions for a sufficient period of time to let them work out their own problems at the local level." Remarks of Senator Dirksen, 110 Cong. Rec. 13087 (1964).[23] Because the managers of the legislation drafted Section 706 to encourage the settlement of employment discrimination claims without having to resort to federal remedies, "the individual complainant cannot file his charge with the Commission until the State or local agency has been given an opportunity to handle the problem under state or local law." Remarks of Senator Humphrey explaining the compromise to the Senate, 1964 Legislative History at 3003. *See Dubois* v. *Packard Bell Corporation*, 470 F.2d 973, 975 (10th Cir. 1972); *Voutsis* v. *Union Carbide Corp., supra*, 452 F.2d at 892 (statutory framework of Title VII embodies a federal man-

[22] Senator Humphrey stated with respect to the compromise that "Section 706(b) provides that in a state with a nondiscrimination law the individual must first follow State procedures for 60 days . . ." 1964 Legislative History at 3006.

[23] In *Oscar Mayer & Co.* v. *Evans*, 99 Sup. Ct. 2066, 2071, n. 3 (1979), this Court recognized that resort to appropriate state proceedings is mandatory. *See White* v. *Dallas Independent School District*, 566 F.2d 906 (5th Cir. 1978); and *Harris* v. *Commonwealth of Pennsylvania*, 419 F. Supp. 10, 13 (M.D. Pa. 1976) (valid charge is instituted before EEOC only when state authority has been afforded an adequate prior opportunity to consider the charge).

date to state action). This compromise, which subsequently became the Civil Rights Act of 1964, contains the same language governing the filing of claims subject to deferral to state 706 agencies as is presently found in 42 U.S.C. § 2000e-5(c).

When Congress made several changes in Title VII of the Civil Rights Act in 1972, it first considered, but then rejected, amending the deferral provision. The Senate Committee on Labor & Public Welfare initially determined that the deferral provision should retain "the present requirements that the Commission defer for a period of 60 days to State or local agencies functioning under appropriate anti-discrimination laws. . . ." S. REP. No. 415, 92nd Cong., 1st Sess. 36 (1971). The Committee went on, however, to propose the deletion of the phrase "no charge may be filed." *Id.* The Committee supported its proposal with the statement that:

> The present statute is somewhat ambiguous respecting Commission action on charges filed prior to resort to the State or local agency. The new language clarifies the present statute by permitting the charge to be filed but prohibiting the Commission from taking action with respect thereto until the prescribed period has elapsed.

The House took a far different approach to the deferral provision, concluding that no change in the subsection as drafted in 1964 should be made. *See* H.R. REP. No. 238, 92nd Cong., 1st Sess. 27 (1971). The bill subsequently approved by the House left the language of the deferral provision intact.

After discussion of the two approaches in the House-Senate conference on H.R. 1746, the Senate

amendment was rejected in favor of the House approach of leaving the deferral provision as it had originally been written. S. REP. No. 681, 92nd Cong., 2nd Sess. 17 (1972). According to the joint explanatory statement of the managers of H.R. 1746, this Court's decision in *Love* permitting the EEOC to receive a charge to be held in suspended animation until the conclusion of the 60-day deferral period at which time the charge would be filed, removed any ambiguity over the proper application of Section 706(c):

> The conferees left existing law intact with the understanding that the decision in *Love* v. *Pullman*, —— U.S. —— (February 7, 1972) interpreting the existing law to allow the Commission to *receive* a charge (but not to act on it) during such deferral period is controlling. *Id.* (Emphasis supplied.)[24]

[24] Instead of relying on the joint explanatory statement of the conference committee, the Second Circuit's opinion is grounded primarily on the views of a single member of the conference committee which are inconsistent with the explanatory statement. *See* 118 Cong. Rec. 7564 (1972), containing a "section-by-section" analysis of H.R. 1746 prepared by Sen. Williams. The weight to be accorded the Senator's statements was discussed by Judge Meskill in his dissent at 602 F.2d at 1094:

> [I]n 1972 Congress chose to leave the design and wording of the limitations subsection intact; the only changes made were a renumbering of the section and the lengthening of the two limitations periods contained therein. In my view, since the intent of the enacting Congress is unambiguous and the amending Congress chose to retain the original scheme, the evidence is insufficient to permit the inference that the later Congress intended to accomplish wholly new ends by leaving intact the scheme constructed by an earlier Congress which had different purposes in mind. *Oscar Mayer & Co.* v. *Evans*, [99 Sup. Ct. 2066, 1073] (1979).

H.R. 1746 and the conference report were then approved by members of the House and Senate. *See* United States Senate, Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, 1853, 1872 (1972).

The Second Circuit, in its discussion of the legislative history, attempts to support its conclusion that Congress really did not intend the phrase "no charge may be filed" to communicate its literal meaning by citing as authority the Senate bill "designed to make explicit the construction we are adopting today." *Silver*, *supra*, 602 F.2d at 1089. In searching for Congressional intent, however, it would seem axiomatic that the statutory language adopted by Congress is a better guide than the language which was rejected. As this Court stated in *Gulf Oil Corporation* v. *Copp Paving Company*, 419 U.S. 186, 200 (1974), a deletion of a statutory provision by a conference committee "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." A similar rule of construction was proffered in *Pan American World Airways, Inc.* v. *CAB*, 380 F.2d 770, 781 (2d Cir. 1967):

> That Congress adopted the House version of the bill, specifically rejecting the Senate's conflicting version, is of course an extremely significant factor in determining what was Congress' intention with respect to the matters in issue.

Thus, to construe Section 706(c) as permitting a submitted charge to be filed during the 60-day deferral period in the face of explicit statutory language barring such a practice is a manifest distortion of legislative intent. This is especially true in light of the Congress' refusal to delete the phrase "no charge may be filed" in the 1972 amendments.

CONCLUSION

For the reasons cited above, the Amicus Curiae urges the Court to reverse the decision of the Court of Appeals for the Second Circuit below and sustain the district court's dismissal of Silver's claim as untimely under Sections 706(c) and (e) of the Civil Rights Act of 1964.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
JEFFREY C. MCGUINESS
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Washington, D.C. 20005